

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LINDA KILLMAN)	
Claimant)	
VS.)	
)	Docket No. 233,268
FOCUS RESIDENTIAL CARE)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the March 14, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on September 12, 2002.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. The record also includes the transcript from the November 15, 2001 hearing before Judge Clark.

ISSUES

This is a claim for a series of accidents from spring 1997 through December 20, 1997. In the application for hearing filed with the Division of Workers Compensation in April 1998, claimant alleged injuries to the head, neck, back and right lower extremity. The parties stipulated that claimant sustained a five percent whole body functional impairment as a result of her work-related injuries.

In the March 14, 2002 Award, Judge Clark found claimant had a five percent permanent partial general disability and also found claimant had an average weekly wage of \$332.90. In determining claimant's permanent partial general disability, the Judge concluded claimant failed to make a good faith effort to find appropriate employment after recovering from her work-related injury. In making that finding, the Judge considered evidence that claimant had failed to cooperate with a vocational counselor in seeking employment.

Moreover, Judge Clark also concluded that despite her work-related injury claimant retained the ability to earn at least 90 percent of her pre-injury wage. Accordingly, the Judge awarded claimant a five percent permanent partial general disability, which was based upon claimant's whole body functional impairment rating.

Claimant contends Judge Clark erred. Claimant argues she did not have transportation and, therefore, could not fully participate in the proposed job search plan formulated by the vocational counselor. Claimant also argues the written goal of the job search plan was to place claimant in a job paying less than her pre-injury wage and, therefore, if the plan had been successful she would be earning less than 90 percent of her pre-injury wage. Claimant also argues her average weekly wage should be \$376.43. Accordingly, claimant requests the Board to award her a work disability (a permanent partial general disability greater than the functional impairment rating) and increase her pre-injury average weekly wage.

Conversely, respondent and its insurance carrier contend the Award should be affirmed. They argue the Judge correctly determined (1) claimant's pre-injury average weekly wage was \$332.90, (2) claimant failed to make a good faith effort to find employment, and (3) claimant retains the ability to earn a comparable wage.

The only issues before the Board on this review are:

1. What is claimant's pre-injury average weekly wage?
2. What is the nature and extent of her injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

The Award should be affirmed.

This is the second time claimant's award has been before the Board. The first time the Board remanded the claim to the Judge to require respondent and its insurance carrier

to provide, among other things, wage information and the number of weeks of temporary total disability benefits that had been paid. Based upon that new information, the Judge entered the March 14, 2002 Award.

Claimant injured her low back, among other injuries, while working for respondent, a care facility for mentally challenged persons. In approximately February or March 2000, claimant's doctor released her to return to work. In a March 2000 report, Dr. Jane K. Drazek placed the following medical restrictions on claimant's work activities:

I believe that this patient would be poorly tolerance [sic] of activities requiring prolonged standing, bending, stooping, twisting or turning. I believe, however, that she could tolerate activities which alternated sit and stand. Lifting greater than 25-30 lbs on an occasional basis and 15-20 lbs on a repetitive basis is likely to be poorly tolerated and should be avoided.

When claimant testified in this claim at the September 2000 regular hearing, she was unemployed, despite having looked for work in the Winfield and Arkansas City, Kansas, areas.

After the regular hearing, respondent and its insurance carrier offered claimant vocational counseling services, which resulted in a job placement plan. As claimant lived in Dexter, Kansas, her lack of reliable transportation presented an obstacle in meeting with the vocational counselor located in Wichita, Kansas. But, claimant's general lack of cooperation as displayed by her failure to call the vocational counselor to cancel or reschedule appointments, failure to complete tasks as assigned by the counselor, and failure to follow through on the job leads provided by the counselor presented a greater impediment to successfully completing the proposed job placement plan.

The principal issue in this claim is whether claimant made a good faith effort to find appropriate employment after she discovered that respondent was unable to accommodate her permanent work restrictions. When considering the entire record, the Board agrees with the Judge that claimant failed to make a good faith effort to find appropriate employment. Accordingly, a post-injury wage should be imputed to claimant for purposes of determining the permanent partial general disability under K.S.A. 1997 Supp. 44-510e.

If a finding is made that a good faith effort [to find appropriate employment] has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .¹

¹ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997).

The Board finds that the opinions of vocational counselor Karen Crist Terrill regarding claimant's post-injury ability to earn wages are persuasive. Ms. Terrill conducted a limited labor market survey in the area around claimant's hometown and discovered several open positions, which paid an average of \$7.29 per hour. Based upon that information, Ms. Terrill believed claimant could earn \$7.29 per hour. In addition, at least five of the employers in the limited survey provided its employees with fringe benefits. Ms. Terrill estimated the cost of the employer-paid health insurance benefits would be approximately \$50 per week and accidental death and disability would cost approximately \$10 to \$20 per month. According to the data provided by Ms. Terrill, claimant retains the ability to earn approximately \$345 per week (\$7.29 per hour x 40 hours per week for straight time, plus \$50 per week for health insurance benefits, plus \$3.46 per week in accidental death and disability insurance).

Claimant's pre-injury average weekly wage is \$332.90 (\$6.43 per hour x 40 hours per week in straight time, plus \$59.14 per week in overtime and other earnings, plus \$16.56 per week for fringe benefits).

Based upon the above findings regarding claimant's residual wage-earning capacity, the Board concludes claimant retains the ability to earn at least 90 percent of her pre-injury average weekly wage, despite the injuries that she sustained while working for respondent. Accordingly, claimant's permanent partial general disability is limited to the stipulated five percent whole body functional impairment rating, as determined by the Judge.

The Board adopts the findings and conclusions set forth in the March 14, 2002 and April 2, 2001 Awards that are consistent with the above.

AWARD

WHEREFORE, the Board affirms the March 14, 2002 Award entered by Judge Clark.

IT IS SO ORDERED.

Dated this ____ day of October 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation